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Harris v. McRae: The Hyde Amendment Stands While Rights of Poor Women Fall

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INTRODUCTION

On June 30, 1980, the Supreme Court of the United States decided *Harris v. McRae.*[1] The case presented the Court with a variety of challenges to the Hyde Amendment,[2] which prohibits the use of federal funds for many therapeutic abortions. Although the primary attack on the statute was based upon constitutional grounds,[3] it was also contended that Title XIX of the Social Security Act required participating states to continue funding medically necessary abortions even if matching federal funds could be legally withheld. In a 5-4 decision,[4] the Supreme Court rejected both challenges, finding the Hyde Amendment to be above constitutional reproach and further finding no basis to require independent state funding under Title XIX.[5]

To even the most detached observer, the decision in *Harris,* which denies health benefits to eligible persons solely because the "medically necessary"[6] treatment which they seek involves the fundamental right to have an abortion, seems extraordinarily short-sighted, shallow and wrong. The discussion which follows will highlight the inadequacies of the *Harris* decision by examining the relationship between the Hyde

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[1] 100 S. Ct. 2671 (1980).

[2] See notes 13-23 *infra* and accompanying text for a discussion of the many versions of the Hyde Amendment.

[3] *See generally* Note, *Constitutional Law—Abortion—No Requirement to Provide Medicaid Funds for Nontherapeutic Abortions Under Title XIX of the Social Security Act of 1965 or the Fourteenth Amendment,* 52 TUL. L. REV. 179 (1977).

[4] The five justices in the majority were Stewart, Burger, White, Powell, and Rehnquist. The four dissenting justices were Brennan, Marshall, Blackmun, and Stevens.

[5] Harris v. McRae, 100 S. Ct. 2671, 2693 (1980).

[6] Generally, Title XIX of the Social Security Act works to provide public funding for "medically necessary" services which eligible persons cannot afford. For a discussion of the purposes of Title XIX and of the requirement that the requested services be medically necessary, see notes 35-39 *infra* and accompanying text.

Amendment and Title XIX of the Social Security Act, by analyzing the constitutional issues with which the Court was confronted, and by exploring the far-reaching and disastrous impact of the Court's decision. It will be seen that the *Harris* decision indeed "marks a retreat from *Roe v. Wade*[7] and represents a cruel blow to the most powerless members of our society."[8]

I. THE SCORE AND SUBSTANCE OF THE HYDE AMENDMENT

A workable understanding of the issues that confronted the *Harris* Court, as well as the possible reasons for which those issues were wrongly resolved, cannot be acquired without first examining the Hyde Amendment itself: its legislative history; the moral touchstones of its character; and its interrelationship with Title XIX of the Social Security Act (hereinafter referred to as the Medicaid Act).

A. *The Evolution of the Hyde Amendment*

1. *Constitutional Law Prior to the Amendment*

The battle over Medicaid funding for abortions began a year after the landmark case of *Roe v. Wade*.[9] In *Roe*, the Supreme Court declared that the right of personal privacy encompassed a woman's right to choose to terminate her pregnancy, ruling that a Texas statute criminalizing abortion except when necessary to save the mother's life violated the due process clause of the fourteenth amendment. The Court, however, carefully explained that the woman's privacy right eventually must yield to the state's interest in protecting the health of the mother and the unborn child.[10] The state inter-

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[7] 410 U.S. 113 (1973).

[8] Harris v. McRae, 100 S. Ct. at 2706 (Marshall, J., dissenting).

[9] 410 U.S. 113 (1973). In *Roe*, the fundamental right to an abortion was found to exist within the larger concept known as "zones of privacy." *Id.* at 156-58. This right of privacy was found to emanate from the fourteenth amendment's concept of personal liberty. The Court, however, recognized other constitutional sources for this right, including the ninth amendment's reservation of rights to the people. *Id.* at 152-53.

[10] While the Court held that the right of privacy encompassed a woman's decision to terminate her pregnancy, it made clear that this right was not without limita-

est was found to be "compelling," and, therefore, sufficient to override individual freedom of choice, after the first trimester of pregnancy.[11]

Given the enormous impact that *Roe* had upon state abortion laws, questions concerning the scope of that decision were inevitable. A question of great importance was whether the federal government would be required to provide indigent women, through Medicaid funding, the economic resources necessary to terminate their pregnancies.[12] In 1973, a bill that restricted funding for abortions was introduced, but it was never adopted.[13] The following year produced the Bartlett Amendment which would have prohibited the use of any Health, Education, and Welfare (hereinafter HEW) funds for abortions.[14] This bill was also defeated, and there were no legislative restrictions placed on the availability of funds for abortions. Finally, during fiscal year 1976-77 the first abortion funding restriction bill was adopted, an amendment drafted by Representative Henry J. Hyde.[15]

The original Hyde Amendment provided that Medicaid funds could not be used for abortions unless the mother's life was endangered,[16] but the Amendment's effect was short-lived. Soon after the bill's passage, the United States Eastern District Court of New York held that the restrictions were unconstitutional, granting an injunction against HEW prohibiting the denial of Medicaid reimbursement for elective abortions.[17] Nevertheless, in the very next year the House of

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tions. *Id.* at 162-66. The Court pointed out that a "pregnant woman cannot be isolated in her privacy . . . . [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." *Id.* at 159.

[11] *Id.* Other permissible regulations suggested by the Court were: (1) regulations as to the licensing of persons who perform the abortion; and (2) regulations as to the licensing of the facility. *Id.*

[12] President Carter felt that the federal government was under no duty to make these funds available. See note 33 *infra* for President Carter's statement on the issue.

[13] Act, 1973, Pub. L. No. 93-189, § 114, 87 Stat. 716 (Dec. 17, 1973).

[14] Act, 1975, Pub. L. No. 94-048, § 1-2, 89 Stat. 247 (July 1, 1975).

[15] Dept. of Labor and HEW Approp. Act of 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

[16] *Id.*

[17] McRae v. Matthews, 421 F. Supp. 533 (E.D.N.Y. 1976).

Representatives approved an identical version of the Hyde Amendment. The Senate, however, insisted on less restrictive language, and a compromise was reached.[18] Because this tenuous substantive compromise was a rider to an appropriations bill,[19] it has been the subject of annual challenge and debate. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or, except for such medical procedures necessary for victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.[20]

The *Harris* Court noted that the present version of the Amendment is broader than that applicable for fiscal year 1977,[21] which did not include the "rape or incest" exception, yet narrower than that applicable for most of fiscal year 1978 (and all of fiscal year 1979) which included an exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[22] The Court stated, however, that its decision in *Harris* would apply as

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[18] The compromise version reads as follows:

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency, or public health service; or except in those instances where severe and long-lasting health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Continuing Approp. Act of 1978, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977).

[19] Dept. of Labor and HEW Approp. Act of 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978).

[20] Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). *See also* Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

[21] *See* Dept. of Labor and HEW Approp. Act of 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

[22] Joint Res. Continuing Approp., Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); HEW Approp. Act of 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978).

well to all earlier versions of the Amendment.[23]

2. *Moral and Political Overtones*

The content of the Hyde Amendment has always been highly controversial.[24] Both the proponents and opponents of the Amendment maintain that their view is morally correct, leaving little room for objective discussion.[25] The sponsor of the Amendment has proclaimed that "killing . . . unborn children" is not a solution to the poverty cycle.[26] It has further been said that abortion "is one way to get rid of poor people. Let us call that pooricide."[27] On the other hand, the Amendment's detractors claim discrimination[28] and maintain that the legislature is not a moral decision-maker.[29] As stated by

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[23] In a footnote to the majority opinion it was stated that "the term, 'Hyde Amendment,' is used generically to refer to all three versions of the Hyde Amendment, except where indicated otherwise." Harris v. McRae, 100 S. Ct. 2671, 2681 n.4 (1980).

[24] The legislative history is replete with rhetoric:

> Hyde: "We hear the claim that the poor are denied a right available to other women if we do not use tax money to fund abortions. Well, make a list of all the things society denies poor women and let them make the choice of what we will give them."
>
> Flood: "This [Hyde Amendment] is blatantly discriminatory . . . . It prohibits abortion for poor people. A vote for this amendment is not a vote against abortion. It is a vote against poor people. That is what it is, as plain as the nose on your face."

122 CONG. REC. H20410-11 (1976).

[25] *See, e.g.*, 122 CONG. REC. H8638 (1976) (remarks of Rep. Noland) for a pro-Hyde view:

> The reverence for life embodied in the Hyde Amendment amounts to a significant reaffirmation of what is best in the American character. Your vote today in favor of the Hyde Amendment is a vote of confidence in our country and our ability to assure a good and productive life for all our citizens.

which may be contrasted with:

> [The Hyde Amendment] really is a measure of our commitment to the idea that the Government has an obligation to help indigent citizens obtain proper medical care . . . . I think it is a very bad idea for a group of politicians . . . to sit around and attempt to decide which operations should be funded . . . .

122 CONG. REC. H26057 (1976) (remarks of Rep. Pattison).

[26] 122 CONG. REC. H26785 (1976) (remarks of Rep. Hyde).

[27] *Id.*

[28] "This is blatantly discriminatory . . . ." 122 CONG. REC. H20411 (1976) (remarks of Rep. Flood).

[29] It has been noted that it is difficult to call abortion immoral: "To say that

one ardent opponent of the Amendment, "The House of Representatives was created to make the laws by which our country is governed. But the Congress most definitely is not gifted with the ability to make moral decisions for an entire nation."[30] Opponents also argue that an appropriations bill is a particularly inappropriate vehicle for effecting an emotionally charged policy determination.[31]

When Representative Henry J. Hyde, the author of the Amendment, was asked by President Carter if he was concerned about the fact that his bill was denying poor women abortions, he replied, "Life is unfair."[32] The "fairness of life"[33] has engendered many bitter battles over the last four versions of the Hyde Amendment, which have been attached as riders

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abortion, while legal is immoral but that only the poor shall be saved from this immorality by a fastidious government is not only unfair but absurd." Morrow, *Of Abortion and the Unfairness of Life*, TIME, August 1, 1977, at 49. "The suggestion that abortion is not so immoral that the state may prohibit it altogether but sufficiently immoral that the state may rescue the poor from it, is absurd, even perverse." Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1244 (1978).

Of course, some persons assert that abortion is immoral. "I think the unborn children whose lives are being snuffed out, even though they might not be adults have a right to live, too, regardless of the mistaken and immoral Supreme Court decision." 122 CONG. REC. H20411 (1976) (remarks of Rep. Bauman).

[30] 124 CONG. REC. H311 (daily ed. June 8, 1978) (remarks of Sen. Pattison). *See also* "The Hyde Amendment is a typical attempt to prohibit the use of money in an appropriations bill for some purpose that the amendment sponsors do not like . . . ." 122 CONG. REC. S20892 (1976) (remarks of Sen. Packwood).

[31] The propriety of utilizing an appropriations bill to effectuate this anti-abortion policy has been severely criticized: "[T]he Senate should not through a funding decision in effect deprive our most vulnerable and helpless citizens, the poor, of an established constitutional right." 123 CONG. REC. S11035 (daily ed. June 29, 1977)(remarks of Sen. Brooke). *See also* 123 CONG. REC. H6083 (daily ed. June 17, 1977) (remarks of Rep. Holtzman); Preterm, Inc. v. Dukakis, 591 F.2d 121, 131 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 444 U.S. 888 (1980).

[32] IX WOMEN TODAY 90 (August 6, 1979). Following Rep. Hyde's remark, the National Abortion Rights Action League (NARAL) presented its first "Life is Unfair" award to Hyde. *Id.*

[33] President Carter also has addressed this issue of federally funded abortions:

> [A]s you know there are many things in life that are not fair, that wealthy people can afford and poor people can't. But I don't believe that the Federal Government should take action to try to make these opportunities exactly equal, particularly when there is a moral factor involved.

N.Y. Times, July 13, 1977 § A, at 1, col. 5.

to HEW appropriation bills.[34] The ultimate battle was waged before the Supreme Court in *Harris*, where a majority of justices viewed the "fairness of life" with a degree of aloofness equal to that of Representative Hyde.

B. *The Medicaid Act and State Funding*

1. *Necessary Medical Services and Therapeutic Abortions*

The Medicaid Act establishes a federal medical assistance plan that allows the federal and state governments to share the expenses of providing necessary medical services to needy persons.[35] The two express purposes of the Act are: (1) to provide medical care for persons unable to meet the cost; and (2) to insure that these same people are able to retain their potential for independence or self-care.[36]

In *Beal v. Doe*,[37] the Supreme Court recognized that the primary purpose of the Medicaid Act was to "enable each state, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of *necessary medical services.*"[38]

To come within the scope of the Medicaid Act, therefore, therapeutic abortions must be considered "necessary medical services."

Since the Act does not specifically mention abortions, it might be argued that no abortions should be funded upon its authority.[39] Were this viewpoint to prevail, of course, the *raison d'être* of the Hyde Amendment would vanish. This position was accepted by the Tenth Circuit Court of Appeals in

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[34] See note 31 *supra* for a discussion of the impropriety of effecting a moral policy decision via an appropriations bill.

[35] 42 U.S.C. § 1396 a(a)(10)(A)-(C) (1976). This program set up a system of "categorically needy" (persons with dependent children, and the aged, blind, and disabled) and "medically needy" (all others unable to afford necessary medical care). The participating states must provide services for the categorically needy and may elect to provide additionally for the medically needy.

[36] *See also* Russo, *State Funding of Elective Abortions: The Supreme Court Defers to the Legislator*, 46 U. CINN. L. REV. 1003, 1004 (1978).

[37] 432 U.S. 438 (1977).

[38] *Id.* at 444.

[39] *See also* Butler, *The Right to Medicaid Payment for Abortion*, 28 HASTINGS L.J. 931, 941 (1977).

Doe v. Rose,[40] which stated: "[W]e lack specific guidance as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by Medicaid benefits."[41] Another argument that might be voiced in support of exclusion has its genesis in *Beal v. Doe*,[42] a case which implicitly held that a state participating in Title XIX is not required by statute to finance "elective" abortions.[43] If "elective," however, is construed to mean not "medically necessary" or "nontherapeutic," *Beal* is valueless as a grounds for excluding therapeutic abortions from the Act's coverage.

In support of the position that abortions were meant to be within the provisions of Title XIX, some scholars have urged that the "family planning services" amendment to the Medicaid Act encompasses abortions.[44] More convincing support for inclusion does exist, however, and this support can be found, ironically enough, in *Beal*. The Court's rejection of the premise that "nontherapeutic" abortions were meant to be covered by the Act creates the negative implication that therapeutic abortions were, in fact, intended to be within the Act's coverage.[45] In addition, the *Beal* Court implied that therapeutic abortions are indeed medically necessary services by upholding a state plan which did provide funding for all therapeutic abortions. The Court found that "Pennsylvania's regulation comports fully with Title XIX's broadly stated primary objective."[46] Justice Brennan dissented in favor of an

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[40] 499 F.2d 1112 (10th Cir. 1974). This case involved a challenge to a Utah policy similar to the present Hyde Amendment. Despite rejecting the Medicaid argument, the court invalidated the state policy as invidious discrimination in violation of the fourteenth amendment. *Id.* at 1114.

[41] *Id.* at 1114.

[42] 432 U.S. 438 (1977).

[43] Russo, *supra* note 36, at 1003.

[44] Butler, *supra* note 39, at 941.

[45] Beal v. Doe, 432 U.S. at 447.

[46] *Id.* at 444. The Pennsylvania plan provided that an abortion is deemed medically necessary if the health of the mother is threatened, if the infant would have physical or mental deficiencies, or in cases of rape or incest which might constitute a threat to the physical and mental health of the patient. 432 U.S. at 441 n.3. It should be noted that the Hyde Amendment in its broadest form would not cover nearly as many therapeutic abortions.

Of course, because state plans may finance *more* types of abortions than are in-

even broader interpretation of Title XIX that would require funding for all abortions, refusing to distinguish among those that are "elective" and those that are "therapeutic." As stated in his opinion, "Once medical treatment of some sort is necessary . . . it is beyond comprehension how treatment of therapeutic abortions and live births constitute 'necessary medical services' under Title XIX, but that for elective abortions does not."[47]

The more plausible reading of *Beal* supports the inclusion of some abortions within the definition of "medically necessary services." Once this premise is accepted, the threshold of medical necessity must be defined. This was also done in *Beal*:

> In *Doe v. Bolton* . . ., this Court indicated that "[W]hether 'an abortion is necessary' is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment."[48]

Although other definitions of "medically necessary" have been propounded,[49] it would seem that, absent the Hyde Amendment, a physician's considered opinion would be sufficient to compel state Medicaid funding for an abortion.[50] Indeed, this was tacitly recognized by the *Harris* Court.[51] The

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cluded in the Hyde Amendment, the Court may not have intended to indicate that such a level of funding was required by the federal Constitution. This fact is made very clear in *Harris*.

[47] 432 U.S. at 450.

[48] *Id.* at 442 n.3.

[49] One author has proposed that the proper way to define medical necessity is to use the definition "used in the medical community: 'the care which is responsive to the problem for which it is offered' ". Butler, *supra* note 39, at 955.

[50] This is probable since it is likely the Supreme Court will follow its earlier decision of Doe v. Bolton, 410 U.S. 179 (1973). Also a recent case, Right to Choose v. Byrne, 405 A.2d 427 (N.J. 1979), used the broad definition of "medically necessary" framed in *Bolton*.

[51] Referring to the opinion of the District Court, which had found the Hyde Amendment to be a substantive alteration of Title XIX, Justice Stewart noted: "It concluded that *although Title XIX would otherwise have required a participating State to include medically necessary abortions* in its Medicaid program, the Hyde Amendment . . . relieve[d] a State of that obligation . . . . We agree with the District Court, but for somewhat different reasons." 100 S. Ct. at 2683 (emphasis added).

import of *Harris*, therefore, is that the Hyde Amendment allows a state to withhold funding under Title XIX even though a medically necessary service is involved.

2. *The Effect of the Hyde Amendment on the Medicaid Act*

a. *The pre-Harris Judicial Response*

When the *Harris* Court was asked to determine what effect, if any, the Hyde Amendment was to have on state funding obligations,[52] it was confronted with two conflicting lines of precedent. The Amendment had theretofore been given one of two possible interpretations. It had been construed as: (1) a funding measure only, thereby requiring the states to fund all therapeutic abortions to avoid inconsistency with the Medicaid Act[53] or, (2) a substantive amendment of the Medicaid Act, which would require states to fund only those abortions that comport with the Hyde Amendment criteria, leaving the funding of additional therapeutic abortions to each state's discretion.[54] Since this issue is purely a question of statutory construction,[55] the object of the search is congressional intent. Prior to the decision in *Harris*, courts attempting to discern legislative intent in this context had examined four basic factors: (1) congressional procedural rules; (2) the judicial policy against repeal by implication; (3) the express terms of the Hyde Amendment; and, (4) the legislative history of the Amendment.

Congressional procedural rules favor a limited reading of the Hyde Amendment, since they clearly prohibit the use of

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[52] At the time of this writing, forty states have restricted funding for abortions in a manner similar to the Hyde Amendment. Only the following states and the District of Columbia have continued to finance all medically necessary abortions: Alaska, California, Colorado, Hawaii, Idaho, Michigan, North Carolina, Oregon, Washington, West Virginia. IX WOMEN TODAY, 56-57 (April 30, 1979).

[53] Doe v. Busbee, 471 F. Supp. 1326, 1333-34 (N.D. Ga. 1979).

[54] Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 444 U.S. 888 (1980); Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *rev'd sub nom.* Williams v. Zbaraz, 100 S. Ct. 2694 (1980).

[55] "It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will inquire first into the statutory question." Harris v. McRae, 100 S. Ct. at 2683.

appropriations bills to amend existing legislation substantively:

> No appropriations shall be reported in any general appropriations bill, or be in order as an amendment thereto, for any expenditures not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order.[56]

In addition to this unambiguous procedural rule, two general rules of statutory construction favor a limited reading of the Hyde Amendment. The first states a preference against the implied repeal of one statute by a subsequent one.[57] The second was explained by the Supreme Court in *TVA v. Hill*:[58] "when confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history."[59]

Nevertheless, some courts rejected these rules of construction, turning instead to an analysis of the Amendment's legislative history. This rejection was the result of an apparent conflict between the plain words of the statute and the policies of the Medicaid Act. In *Preterm Inc. v. Dukakis*,[60] the First Circuit Court of Appeals refused to apply the plain meaning rule of *Hill*, stating:

> When the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole" and aid to construction of the meaning of words, as used in the statute, is available there certainly can be no "rule of law" which forbids its use, however clear the words

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[56] House Rule XXI (2).

[57] Preterm, Inc. v. Dukakis, 591 F.2d 121, 135-38 (1st Cir. 1979), *appeal dismissed*, 444 U.S. 888 (1980).

[58] 437 U.S. 153 (1978).

[59] *Id.* at 184 n.29. The Court explained its position further:

> The doctrine of disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act.

Id. at 190.

[60] 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 444 U.S. 888 (1980).

may appear on "superficial examination."[61]

The court concluded that the absence of congressional statement as to whether states would be required to fund therapeutic abortions strongly supported the position that the states should not be burdened with duties not placed upon the federal government.[62]

In *Zbaraz v. Quern*,[63] the Seventh Circuit concurred with the First Circuit's analysis of the Amendment, noting further:

> Moreover, no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required. To the contrary, the assumption was that when federal funds were withdrawn, the states although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, would refuse to do so.[64]

The Eighth Circuit also felt that the Hyde Amendment worked a substantive amendment of Title XIX.[65] Echoing the Seventh Circuit's thoughts, the Eighth Circuit pointed to legislative history and found that:

> [C]ommon sense of the matter is that the supporters of the Amendment wanted to induce a general halt to the public financing of abortions, and not to shift, with no apparent rational motivation, a large part of the cost . . . to the states. To interpret the Hyde Amendment as anything but a substantive amendment of Title XIX is to make it a futility.[66]

Although the First, Seventh and Eighth Circuits were persuaded by legislative history that Congress did intend to

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[61] *Id.* at 128.

[62] *Id.* at 130, 131.

[63] 596 F.2d 196 (7th Cir.), *rev'd sub nom.*, Williams v. Zbaraz, 100 S. Ct. 2694 (1980). The Seventh Circuit, in testing the Illinois statute patterned after the Hyde Amendment, had remanded to the district court for a finding of the Hyde Amendment's constitutionality. The district court opinion, Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.), *vacated and remanded*, 596 F.2d 196 (7th Cir. 1979), will be a major focus of this Note's discussion as to the Hyde Amendment's constitutionality.

[64] 596 F.2d at 200.

[65] Hodgson v. Board of County Comm'rs, 614 F.2d 601 (8th Cir. 1980).

[66] *Id.* at 614. The dissent, however, cited the "cardinal rule" against repeals by implication. *Id.* at 616 (McManus, J., dissenting).

alter the substantive provisions of Title XIX[67] by the Hyde Amendment, other courts found the rule of construction articulated in *TVA v. Hill*[68] to compel the opposite conclusion. In *Doe v. Busbee*[69] a Georgia federal district court determined that the clear language of the statute demonstrated that the Hyde Amendment did not work a substantive amendment of Title XIX, stating: "The Court finds the language of the Hyde Amendment unambiguous, obviating resort to the legislative history for its construction. The Hyde Amendment on its face clearly operates merely to restrict the use of federal funds for abortion."[70] The *Busbee* court's refusal to scrutinize congressional history is significant. It is consistent with the policy recognized by the Supreme Court in *TVA v. Hill* and avoids the pitfalls of interpreting legislative silence on the issue.[71]

The weakness of the view taken by the First and Seventh Circuits is its dependence upon the significance of congressional silence.[72] Congress' failure to speak would equally indicate that the states' existing duties under Title XIX were to remain unaffected. One of those existing duties was the responsibility to fund "medically necessary" abortions. Certainly this responsibility under Title XIX expressed by the Supreme Court in *Beal v. Doe*[73] would not have been ignored by Congress in the event that a substantive amendment was intended.[74]

More importantly, the holding in *Doe v. Busbee* is supported by tangible, credible rules of statutory construction

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[67] *See* Zbaraz v. Quern, 596 F.2d at 201.

[68] 437 U.S. 153 (1978).

[69] 471 F. Supp. 1326 (N.D. Ga. 1979).

[70] *Id.* at 1334.

[71] See TVA v. Hill, 437 U.S. 153 (1978) and note 59 *supra* with accompanying text for a discussion of this policy.

[72] The position ultimately taken by the Supreme Court on this issue in Harris v. McRae, 100 S. Ct. 2671 (1980), also depends largely on legislative silence, as noted by the Court: "*[A]bsent an indication of contrary legislative intent . . .*, Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable." *Id.* at 2684 (emphasis added).

[73] 432 U.S. 438 (1977).

[74] See Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 444 U.S. 888 (1980), for a full discussion of the congressional debates on both sides of the controversy.

and by direct evidence of congressional intent. The words of the Amendment purport to be no more than an appropriations bill: "Provided, that *none of the funds provided for* in this paragraph shall be used to perform abortions except where the life of the mother would be endangered . . . [or in cases of] rape or incest."[75] In addition, there is no extrinsic evidence to support the premise that Congress ignored its own procedural rules. As pointed out by Judge Bownes in his dissent in *Preterm, Inc.*:

> There is scant mention in the congressional debate of these rules or the fact that both houses intended to flout them. Are we to assume that Congress deliberately evaded and ignored its own procedural rules, or forgot them, or was entirely ignorant of them?[76]

The compelling inference is that Congress did not intend to amend substantively the Medicaid Act's provisions that require states to fund therapeutic abortions.

The *Busbee* court held that because the Act's provisions had not been affected by the Hyde Amendment, Georgia was required to fund all medically necessary abortions to comply with the Medicaid Act's purposes and regulations.[77] The Medicaid regulations, which have the force of law, provide in part: "The medical agency may not deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."[78] The position taken, however, by the First and Seventh Circuits, as well as that taken by the Supreme Court in *Harris*, would require states to fund only Hyde Amendment abortions.[79] Following this lead, many states have enacted legislation patterned after that sponsored

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[75] Pub. L. No. 96-123, § 3109, 93 Stat. 926 (1979).

[76] 591 F.2d at 138 (Bownes, J., dissenting). Bownes noted that "Senator Magnuson did state that the amendment should not be part of an appropriations bill, but did not advert to the Senate rule." *Id.* at 138 n.3.

[77] 471 F. Supp. 1326 (N.D. Ga. 1979).

[78] 42 C.F.R. § 440.230(c)(1) (1979).

[79] Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 444 U.S. 888 (1980); Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *rev'd sub nom.* Williams v. Zbaraz, 100 S. Ct. 2694 (1980).

by Representative Hyde.[80]

b. *The* Harris *Response*

In *Harris v. McRae* a majority of the Court held that Title XIX "does not require a participating state to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."[81] Although a state may choose to continue to fund such abortions on its own,[82] it has been demonstrated that few states will do so as a practical matter.[83]

The Court's conclusion was in one sense a rejection of all earlier precedent on the issue. The Medicaid program was found to be a system of "cooperative federalism,"[84] and the issue of whether Congress had intended a substantive amendment of the Medicaid Act was sidestepped.[85] As described by Justice Stewart:

> The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating state. Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress *intended* to require a participating state to assume the full costs of providing any

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[80] See note 52 *supra* for a list of the few states who still fund all medically necessary abortions.

[81] 100 S. Ct. 2671, 2685 (1980).

[82] "A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." *Id.* at 2685 n.16.

[83] See note 52 *supra* for data confirming that most states will refuse to pay for abortions not within the Hyde Amendment.

[84] 100 S. Ct. at 2683. The Court cited King v. Smith, 392 U.S. 309 (1968), for this proposition.

[85] Since Title XIX itself provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need not inquire, as the District Court did, whether the Hyde Amendment is a substantive amendment to Title XIX. The present case is thus different from *T.V.A. v. Hill*, 437 U.S. 153 [1978], . . . where the issue was whether continued appropriations for the Tellico Dam impliedly repealed the substantive requirements of the Endangered Species Act prohibiting the continued construction of the Dam because it threatened the natural habitat of an endangered species.

Harris v. McRae, 100 S. Ct. at 2684 n.14.

health services in its Medicaid plan.[86]

The weakness with this position is that the Hyde Amendment did, in effect, work a substantive amendment of Title XIX by removing a medically necessary service (therapeutic abortion) from the Act's protection. Furthermore, even the stance taken by the *Harris* Court, that no substantive amendment occurred, was based upon congressional intent, and this intent was discerned from the depths of congressional silence.[87] In view of the devastating impact that the *Harris* decision will have, an impact that was foreseen by the Court,[88] a cursory treatment of this issue is inexcusable.

II. THE CONSTITUTIONALITY OF THE HYDE AMENDMENT

Given that participating states may refuse to fund abortions under Title XIX due to the *Harris* interpretation of the Hyde Amendment,[89] the focus must shift to the Amendment itself. The *Harris* Court was faced with a variety of constitutional challenges to the Hyde Amendment,[90] based primarily on due process and equal protection grounds. Five of the nine justices found the Amendment to be constitutionally valid.[91]

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[86] *Id.* at 2684 (emphasis added). However, see *id.* at n.13, wherein the Court refers to situations in which states were *required* to assume the full costs of certain services.

[87] See note 72 *supra* for a discussion of this point.

[88] *See* Harris v. McRae, 100 S. Ct. at 2706-07 (Marshall, J., dissenting).

[89] *Id.* at 2685; Williams v. Zbaraz, 100 S. Ct. 2694 (1980), *rev'g* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979). *Williams* was a companion case to *Harris* and was decided on the same day. The Court in *Williams* upheld the abortion funding restrictions of Illinois. It was noted that after *Harris*, Title XIX does not require a participating state to fund abortions for which federal funding is unavailable regardless of which version of the Hyde Amendment the state has chosen to adopt. 100 S. Ct. at 2701 n.11.

[90] Although the Amendment was attacked primarily on the grounds of equal protection and substantive due process, the appellees also contended that the Hyde Amendment was in violation of both the establishment clause and the free exercise clause of the first amendment. The Court had little trouble dismissing both contentions, finding no contravention of the establishment clause since the Hyde Amendment merely coincided with a particular religious viewpoint. The Court declined to reach the merits of the free exercise challenge since none of the challengers had standing to raise the issue. Harris v. McRae, 100 S. Ct. at 2689-90.

[91] Harris v. McRae, 100 S. Ct. 2671 (1980). Justice Stewart delivered the opinion of the Court which was joined by Justices Burger, Powell, Rehnquist, and White.

In order to understand the impropriety of this position, it is first necessary to review the earlier decisional law in the areas of substantive due process and equal protection. It will then become readily apparent that the *Harris* ruling was an abrogation of existing law marking a substantial retreat in the area of womens' constitutional rights.[92]

A. *Constitutional Law Prior to* Harris

1. *Substantive Due Process*

The constitutional doctrine of substantive due process provides that where there is a substantial and direct impingement upon a fundamental right, the government may justify its action only by demonstrating a compelling state interest.[93] Such a determination turns upon the judicial definitions of fundamental rights[94] and compelling state interests.

As was previously discussed, the Supreme Court in *Roe v. Wade*[95] recognized the woman's right to choose to terminate her pregnancy as a fundamental right found within the more generic "zones of privacy" concept.[96] This concept first achieved constitutional status in *Griswold v. Connecticut*,[97] wherein the Court invalidated a state law that prohibited the use of contraceptives. The individual's interest in contraceptive choice was found to be a fundamental right within the "zones of privacy" protected by the Constitution, and the state failed to demonstrate a compelling interest for infringe-

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Justice White also wrote a separate opinion.

[92] "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that the guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 2706 (Brennan, J., dissenting).

[93] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[94] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), defined those rights that are fundamental as only those that have been explicitly or implicitly guaranteed by the Constitution.

[95] 410 U.S. 113 (1973).

[96] "[T]he Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the constitution." *Id.* at 152. The Court further stated that in its view the right of privacy is founded in the fourteenth amendment's concept of personal liberty. *Id.* at 153.

[97] 381 U.S. 479 (1965).

ment.[98] *Griswold* and its progeny relating to procreative[99] and marital[100] rights formed the basis for the *Roe* decision, a decision that further defined the "zones of privacy" protected by the fourteenth amendment's personal liberty clause.[101] The right established in *Roe,* while not an unqualified right to an abortion,[102] has since been deemed to be a highly protected right.[103]

The Supreme Court has elaborated on the *Roe* decision, finding that statutes requiring spousal or parental consent to an abortion are unconstitutional.[104] In *Bellotti v. Baird,*[105] which struck down such a consent requirement, the Court articulated a standard under the due process clause for measuring the validity of a state abortion regulation. Any state law that unduly burdens a woman's right to obtain an abortion in the first trimester of pregnancy may not be justified by any interest. Finally, in *Carey v. Population Services International,*[106] the Court invalidated a New York statute that forbade the sale of contraceptives to minors under sixteen years of age, reasoning that the right of privacy also protects deci-

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[98] *Id.* at 485-86.

[99] *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972) (single and married persons have a right to equal access to contraceptives); *see also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental rights of marriage and procreation violated by state law which required sterilization of persons convicted more than twice of felonies involving moral turpitude).

[100] *See* Loving v. Virginia, 388 U.S. 1 (1967) (Virginia law prohibiting interracial marriage held to violate the freedom to marry).

[101] *See* Roe v. Wade, 410 U.S. at 153.

[102] The *Roe* Court explained that the right to an abortion was properly regulated by the state only in the second trimester, where the state could regulate the procedure for the mother's health, and in the third trimester, where the state could proscribe abortion except when the mother's life or health was endangered. *Id.* at 164-65. Thus, it is only in the second and third trimesters that the state has a compelling interest sufficient to impinge upon the woman's right to choose an abortion. *Id.*

[103] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[104] *See id.*; Bellotti v. Baird, 428 U.S. 132 (1976). The *Danforth* Court reasoned that "since the state cannot regulate or proscribe abortion during the first stage [of pregnancy], when the physician and his patient make the decision, the state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." 428 U.S. at 69.

[105] 428 U.S. 132 (1976). In striking down the state's interpretation of the parental consent requirements as "parental veto," the Court called such an interpretation an undue burden. *Id.* at 147.

[106] 431 U.S. 678 (1977).

sions relating to marriage and procreation. Justice Brennan, writing the majority opinion, stated: "[A]ny regulations burdening the decision whether to bear a child mandates application of the compelling interest standard."[107]

The stage was finally set for the *Harris* decision by three cases decided in 1977. In *Maher v. Roe*,[108] the Court, somewhat surprisingly in light of *Carey*, applied a rational basis standard to determine the constitutional propriety of a state scheme funding childbirth expenses while failing to provide funds for *elective* abortions.[109] The Supreme Court concluded that such a scheme was a valid exercise of state power and that the state regulation disallowing *nontherapeutic*[110] abortions did not unduly burden the woman's right to decide to end her pregnancy.[111] In *Beal v. Doe*,[112] a companion case, the Court held that Title XIX does not require state funding of *elective* abortions. In a third case, *Poelker v. Doe*,[113] the Court held that a municipal welfare regulation which forbade the performance of any *elective* abortions was not violative of the fourteenth amendment. It should be noted that each of these three decisions dealt with the right to funding for an elective, or nontherapeutic, abortion.

2. *Equal Protection*

The primary principle of the equal protection clause is that if a particular government action unduly burdens a "suspect classification" of persons, the government must then demonstrate a compelling interest to justify the action.[114] The compelling interest standard of review will also apply when the fundamental rights of a particular group are impeded. Ab-

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[107] *Id.* at 686.

[108] 432 U.S. 464 (1977).

[109] *Id.* at 474.

[110] It is very important to recognize that the Connecticut Welfare Department regulations challenged in *Maher* involved funding for *elective*, or *nontherapeutic*, abortions. *Id.* at 466.

[111] *Id.* at 484.

[112] 432 U.S. 438 (1977).

[113] 432 U.S. 519 (1977).

[114] *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

sent the existence of a fundamental right or a suspect class, a less demanding standard of review, the "rational relationship" test, will apply. Under the lesser standard, the government must only demonstrate its action to be "rationally related to a legitimate purpose."[115]

The Court in *Maher v. Roe*[116] easily dismissed the contention that a suspect classification was involved.[117] This was done by pointing out that neither wealth[118] nor gender-based classifications[119] contain the traditional indicia of specially protected classes. Furthermore, the *Maher* Court concluded that there was no infringement of a fundamental right,[120] emphasizing that there is a difference between direct state interference with a protected right and mere state encouragement of an alternate activity.[121] The policy of favoring funding for childbirth and excluding monies for elective abortions was found to be a proper value judgment within the legislature's discretion. The exercise of this discretion was said to place "no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[122] Three dissenting justices[123] an-

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[115] It has been observed that the Burger Court, as opposed to the Warren Court, requires greater state justification for the rational relationship test, while requiring less rigor in the application of strict scrutiny. *Id.* at 8.

[116] 432 U.S. 464 (1977).

[117] The Court has recognized very few "suspect" classes: (1) race or national origin was first viewed as a suspect class in Korematsu v. United States, 323 U.S. 214 (1944); (2) alienage has been recognized as suspect in Graham v. Richardson, 403 U.S. 365 (1971); (3) illegitimacy was deemed suspect in Trimble v. Gordon, 430 U.S. 762 (1977); and (4) gender-based classifications have sometimes been subjected to an intermediate level of scrutiny. See note 119 *infra* for a brief discussion of this standard.

[118] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). In Maher v. Roe, 432 U.S. 464 (1977), the Court stated: "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." *Id.* at 470-71.

[119] Kahn v. Shevin, 416 U.S. 351, 355 (1974). Gender classifications are not suspect, but they often are scrutinized under an intermediate test, which, though unclear, has been said to require that any classification based on sex "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[120] 432 U.S. at 474.

[121] *Id.*

[122] *Id.* This position has been criticized in that it fails to account for the proposition that " 'State encouragement of an alternate activity consonant with legislative policy' must be recognizable as something other than a disapproval of an effort to discourage the protected activity. Otherwise, 'the right to encouragement' will consti-

grily attacked this position by demonstrating that in the context of other fundamental rights, absolute obstacles had not been required to invalidate the law.[124]

The state regulation in *Maher* was upheld when subjected to the rational relationship test.[125] The query was whether a legitimate state purpose was promoted by treating Medicaid women seeking money for childbirth differently from those seeking money for elective abortions. The Court found Connecticut's distinction to be rationally related to the legitimate state purpose of encouraging childbirth.[126] After *Maher,* the remaining question was whether the same analysis would apply when funding for medically necessary abortions was withheld.

B. *The Constitutional Analysis in* Harris

1. *Substantive Due Process*

Following *Maher,* there was some reason to believe that a substantive due process argument could be used more effectively in the *Harris* context. It appeared that a fundamental

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tute nothing more than a covert form of state interference with that activity." Perry, *supra* note 29, at 1198.

[123] Justices Marshall, Blackmun, and Brennan dissented in *Maher.*

[124] 432 U.S. at 487. Brennan relied upon the following cases to support that proposition: Linmark Ass'n. v. Township of Willingboro, 431 U.S. 85 (1977) (freedom of expression); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise of religion).

[125] Under the rational relationship test, state laws are easily upheld, whereas under strict scrutiny, state laws and policies are normally invalidated. Between these tests lies an intermediate level of review advocated by Justice Marshall, a standard which would have proven effective in *Harris. See* Note, *Medicaid Funding for Abortions: The Medicaid Statute and the Equal Protection Clause,* 6 HOFSTRA L. REV. 421, 432-33 (1978).

Marshall's theory is also called the "sliding scale" approach, because it weighs the importance of the governmental benefits denied, the character of the class, and the asserted state interests. Marshall, dissenting in *Beal,* would have invalidated the state regulation since the state's interest in the fetus is outweighed by the important governmental benefits denied, with a crucial consideration being that the class affected is the poor. 432 U.S. at 458. While it is unclear which rights will trigger the intermediate level of review, middle-tier scrutiny has been applied to classifications based on illegitimacy, gender, and the right to marry. *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (right to marry); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190, 198 (1976) (gender).

[126] 432 U.S. at 478. *See also* Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. Ct. 1979).

constitutional right to a "medically necessary" abortion, as opposed to a purely elective one, might indeed exist.[127] Indeed, it was argued that the "absolute obstacle" test of the majority in *Maher* might be applied to indigents desiring abortions because a lack of funding in such a case might constitute a direct barrier. It seemed "clear under *Roe [v. Wade]* and *Doe [v. Bolton]* that a complete ban on surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed."[128] The *Harris* decision laid such notions to rest by flatly stating that the Hyde Amendment was not a violation of substantive due process.[129]

Essentially, the *Harris* Court extended the rationale of *Maher* to the situation where a medically necessary abortion is sought. *Maher* was seen as standing for the proposition that "Wade and its progeny did not prevent a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds."[130] In accordance with this position, it was found that the Hyde Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."[131]

It is at this point that the rationale of *Maher*, as it reappears in *Harris*, breaks down. The majority position in both cases is fallacious because it is based upon an entirely false premise, that a withdrawal of funding leaves the indigent wo-

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[127] *See generally* Beal v. Doe, 432 U.S. 438 (1977). Although in the aftermath of *Maher* it appeared that an equal protection argument would be more effective than one based on due process in the context of medically necessary abortions, there was some support for the latter approach. *See* Moore v. East Cleveland, 431 U.S. 494 (1977) (substantive due process was applied by the Court to protect the sanctity of the family from intrusive city regulation). At least one author has attacked the Court for failing to use substantive due process in the abortion context. Perry, *supra* note 29, at 1221. *But see* Fahy, *The Abortion Funding Cases: A Response To Professor Perry*, 67 GEO. L.J. 1205 (1979) (approving of the Court's use of equal protection).

[128] Hathaway v. Worcester City Hospital, 475 F.2d 701, 706 (1st Cir. 1973).

[129] 100 S. Ct. at 2689.

[130] *Id.* at 2687.

[131] *Id.*

man with a choice as to whether to terminate her pregnancy.[132]

Every abortion decision since *Roe*, including *Harris*, has recognized that a pregnant woman has a right to choose to terminate her pregnancy and that this choice is hers alone in most instances.[133] On a purely theoretical basis, the majority in *Harris* correctly observes that the Hyde Amendment places no obstacle in the path of a woman choosing to exercise this right. In reality, however, any choice has been "effectively removed . . . from the indigent woman's hands."[134] By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the government literally "makes an offer that the indigent woman cannot afford to refuse."[135]

The Hyde Amendment and the *Harris* decision furthermore are not in keeping with the principle espoused in *Roe v. Wade*.[136] *Roe* promises a woman the unqualified right to terminate her pregnancy during the first trimester and thereafter when her life or health is endangered. The Hyde Amendment, by withdrawing necessary funds, renders an indigent woman completely incapable of exercising her constitutional prerogative. After *Harris*, this obstacle exists even if the desired abortion is medically necessary and even where severe health damage might result either to the mother or to the fetus if carried

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[132] This inherent defect is correctly highlighted by Justice Brennan: "The fundamental flaw in the Court's due process analysis is its failure to acknowledge that the discriminatory distribution of the benefits of the governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of these rights through criminal and regulatory sanctions." *Id.* at 2704 (Brennan, J., dissenting). These sentiments echoed those he had earlier expressed in *Maher*:

> To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by the State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality," of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

432 U.S. at 483 (Brennan, J., dissenting).

[133] Indeed this was recognized by the *Harris* Court. 100 S. Ct. at 2686.

[134] 100 S. Ct. at 2704 (Brennan, J., dissenting).

[135] *Id.*

[136] 410 U.S. 113 (1973).

to term.[137]

Finally, the *Harris* Court's reliance on *Maher* is misplaced, for the situations involved in the two cases were strikingly different. The relief sought in *Maher* was federal funding for nontherapeutic abortions. By definition, such abortions are not "medically necessary" within the requirements of the Medicaid Act.[138] By contrast, the *Harris* case involved therapeutic abortions, which do fall within the "medically necessary" limitation on Medicaid eligibility. While the *Maher* decision may have been incorrect, the mischief it worked pales when compared to the terrible injustice of *Harris*.

2. *Equal Protection*

The equal protection analysis applied in *Harris* is fatally defective in at least three important respects: (1) an inappropriate standard of review was applied; (2) the Court failed to define the burdened class; and (3) the Hyde Amendment should have been declared unconstitutional even under the rational relationship test.

a. *Standard of Review*

Although some support for application of the strict scrutiny standard in the *Harris* context does exist,[139] it became

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[137] Justice Marshall points to four areas in which the Hyde Amendment works to withold funding despite the severe and long-lasting health problems that are certain to occur: (1) the Amendment prohibits federal funding for abortions that are necessary in order to protect the health and sometimes the life of the mother; (2) funding is denied in cases in which severe mental disturbances will be created by unwanted pregnancies resulting in suicide, attempts at self-abortion, or child abuse; (3) the Amendment denies funding for the majority of women whose pregnancies have been caused by rape or incest; and (4) federal funding is unavailable even cases where it is known that the fetus will be unable to survive. 100 S. Ct. at 2707 (Marshall, J., dissenting).

[138] "A fundamentally different question was decided in *Maher v. Roe*, 432 U.S. 464. . . . Unlike these plaintiffs, the plaintiffs in *Maher* did not satisfy the neutral criterion of medical need, they sought a subsidy for nontherapeutic abortions—medical procedures which by definition they did not need." 100 S. Ct. at 2712 (Stevens, J., dissenting).

[139] *See, e.g.*, Reproduction Health Services v. Freeman, 614 F.2d 585 (8th Cir. 1980); Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. 1979). The *Byrne* case provided that:

> After Medicaid funding for medically necessary abortions for the protection

apparent with the *Maher* decision that the rational relationship test was more likely to be applied.[140] A simplistic, two-tiered approach to all equal protection questions has often proved unsatisfactory,[141] however, and the *Harris* situation illustrates its shortcomings.

There is a great disparity between the two prevailing standards of equal protection review—strict scrutiny and rational relationship; moreover, there are many potential classes of persons that fit neatly into neither category. While classifications based on gender[142] and wealth[143] may not be affected with the traditional indicia which makes a class suspect,[144] laws that burden these classes should certainly be subjected to harsher review than laws which distinguish between opticians

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> of pregnant women's health was made available, its witholding should not be discriminatory, barring funding for abortions but not for other medically necessary treatments and procedures, except on the basis of a compelling state interest under federal constitutional law.

Id. at 594.

[140] "*Maher* compels the conclusion, therefore, that [the Illinois statute restricting abortion funding] impinges on no fundamental right and should not be subjected to strict judicial scrutiny." Zbaraz v. Quern, 469 F. Supp. 1212, 1217 (N.D. Ill.), *vacated and remanded*, 596 F.2d 196 (7th Cir. 1979), *rev'd on other grounds sub nom.*, Williams v. Zbaraz, 100 S. Ct. 2694 (1980).

[141] See note 125 *supra* for a discussion of Justice Marshall's alternative approach to equal protection problems.

[142] Although gender-based classifications have been reviewed under an intermediate standard, see note 119 *supra*, it is difficult to define the class of persons burdened by the Hyde Amendment by sexual criteria. *See* Geduldig v. Aiello, 417 U.S. 484 (1974). In *Geduldig*, a case involving a challenge to a state disability insurance plan which did not cover pregnancy, the Court rejected a gender-based classification:

> The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Id. at 497 n.20. Presumably, this kind of analysis would prohibit a gender-based classification of a group of women who desire medically necessary abortions as versus men who desire other medically necessary operations. The Court could redraw the classes, as in *Geduldig*, to the class of women who seek an abortion versus those who do not. Since women fall into both categories, there would be no finding of gender-based discrimination. It is undeniable, however, that the classification in such cases, however drawn, indeed has some sexual overtones, even if it does not fit neatly into a gender-based category.

[143] See note 147 *infra* and accompanying text for the manner in which the *Harris* Court identified the subject class and applied a two-tiered analysis.

[144] *See* Maher v. Roe, 432 U.S. 464 (1977).

and opthalmologists.[145] It would certainly seem proper that when the burdened class is defined in terms of both *wealth* and *sex* a stricter standard should apply. When coupled with the fact that the burdened class is deprived of the opportunity to exercise a *fundamental right*, the need for stricter review becomes obvious.

b. *Defining the Class*

Perhaps the failure of the *Harris* Court to apply an appropriate standard of review, and the further failure to properly resolve the case upon the standard which was applied, is in part attributable to the fact that no burdened class was ever defined. The majority opinion, relying on *Maher*,[146] made but a feeble attempt to identify the burdened class, stating:

> It is our view that the present case is indistinguisable from *Maher* in this respect. Here, as in *Maher*, the principal impact of the Hyde Amendment falls on the indigent. But the fact does not render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification.[147]

While more thoughtful efforts have been made at properly defining the class involved,[148] it is clear that indigency is not the only distinguishing feature of the class burdened by the Hyde Amendment. Its members are women, and they are women who seek to exercise a constitutional right. Furthermore, while the majority may have perceived the situation as being "indis-

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[145] Harris v. McRae, 100 S. Ct. at 2708 (Marshall, J., dissenting). Justice Marshall was referring to the rational relationship test as applied in Williamson v. Lee Optical, 348 U.S. 483 (1955).

[146] The *Maher* Court had earlier found that "[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." 432 U.S. at 471, citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471 (1970). Note, however, that "an indigent woman desiring an abortion" involves a category described in terms of *wealth, sex,* and pursuit of *fundamental rights.*

[147] 100 S. Ct. 2691 (1980).

[148] *See, e.g.*, Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.), *vacated and remanded*, 596 F.2d 196 (7th Cir. 1979), *rev'd sub nom.* Williams v. Zbaraz, 100 S. Ct. 2694 (1980); Reproduction Health Services v. Freeman, 614 F.2d 585 (8th Cir. 1980); Right to Choose v. Byrne, 405 A.2d 427 (N.J. Super. 1979).

tinguishable from *Maher*," it should be noted that the *Harris* situation also involved the health of the mother, a factor not present in *Maher*. This factor, however, was a "distinction without a difference" to Justice Stewart.[149]

c. *The Rational Relationship Test*

In order to remain consistent with established constitutional doctrine and *Maher v. Roe*,[150] it was perhaps foreseeable that the Court would apply the rational relationship test in *Harris*. The unwelcome surprise was that the Hyde Amendment was found to comport with the constitution under that standard.[151]

Perhaps the most effective way of depicting the inadequacy of *Harris* is by examining the treatment given the same issue in *Zbaraz v. Quern*,[152] a case decided by an Illinois federal district court and which ultimately reached the Supreme Court as a companion case to *Harris*.[153] In *Zbaraz*, the court considered the two classes created by the Hyde Amendment and its state prototype, holding that each failed to bear a reasonable relationship to a legitimate government purpose.[154] The *Zbaraz* court refused to analyze the case on the basis of gender discrimination, applying the rational relationship to two classes of women requiring medically necessary abortions. In defining the classes involed and delineating the applicable standard, the Court stated: "Here since indigent women in

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[149] 100 S. Ct. at 2691.

[150] 432 U.S. 464 (1977).

[151] Under Title XIX and the Hyde Amendment, funding is available for essentially all necessary medical treatment for the poor. Respondents have met the statutory requirements for eligibility, but they are excluded because the treatment that is medically necessary involves the exercise of a fundamental right, the right to choose an abortion. In short, respondents have been deprived of a governmental benefit for which they are otherwise eligible, solely because they have attempted to exercise a constitutional right. . . . In such circumstances the Hyde Amendment must be invalidated because it does not meet even the rational-basis standard of review. 100 S. Ct. at 2710 (Marshall, J., dissenting).

[152] 469 F. Supp. 1212 (N.D. Ill.), *vacated and remanded*, 596 F.2d 196 (7th Cir. 1979), *rev'd sub nom.* Williams v. Zbaraz, 100 S. Ct. 2694 (1980).

[153] See note 89 *supra* for a synopsis of this case.

[154] 469 F. Supp. at 1218.

medical need of abortion are treated differently than indigent women in need of other surgical procedures, we must subject the statute to the rational relationship test."[155] This conclusion is consistent with *Maher v. Roe*.[156]

The state and federal governments alleged that two legitimate interests were forwarded by the legislation: (1) fiscal frugality; and (2) the protection of the fetus.[157] The *Zbaraz* court rejected the first ground summarily, stating that "the record in this case supports the contrary conclusion that the costs of prenatal care and post partum care are substantially higher than the cost of abortions."[158] The state's interest in the protection of the fetus, however, was given serious consideration. Although this interest was found controlling in *Maher*, it was not as persuasive to the *Zbaraz* court when weighed against the mother's interest in her own health.[159] The reason that the Hyde Amendment and its state counterparts were deemed so dangerous was precisely because they do not cover most "health problems associated with pregnancy . . . and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother."[160] Because conditions such as sickle-cell disease were excluded,[161] the court ruled that a statute cannot

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[155] *Id.*

[156] 432 U.S. 464 (1977). See note 142 *supra* for an explanation of why the Hyde Amendment was not scrutinized under an intermediate standard.

[157] 469 F. Supp. at 1218-19.

[158] *Id.* at 1218. "Plaintiff's have produced convincing statistical evidence that the average state payment for an abortion is approximately $145.00, compared to an average cost to the State of $1,370.00 for funding a childbirth." *Id.* at 1218 n.8. *See also* Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting). "The Court's financial argument . . . is specious [considering] the welfare costs that will burden the state for the new indigents and their support in the long, long years ahead." *Id.*

[159] *Id.* at 1219. *See* Roe v. Wade, 410 U.S. 113, 159 (1973).

[160] 469 F. Supp. at 1220. In Right to Choose v. Byrne, 405 A.2d 427 (N.J. 1979), the New Jersey court cited examples of health problems not covered by the Hyde Amendment: "Examples include all those with psychological health disorders, and many, particularly in the initial stages of pregnancy, whose diagnosis is heart disease, diabetes, kidney disease, chronic lung disease, sickle cell anemia, drug addiction, excessive nausea with dehydration, hypertension, thrombophlebitis, skin cancer, gastrointestioral ulcers, or ulcerative colitis." *Id.* at 429.

[161] The Court also explained that the Illinois law ignored the serious threat to an indigent pregnant woman's psychological health. For example, the court noted that sickle-cell disease, which causes pregnant women to retain a 25% probability of going

protect a non-viable fetus where the price is to increase maternal morbidity and mortality. It was found that "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate."[162] Therefore, the court found both the Hyde Amendment and the Illinois statute unconstitutional[163] as a denial of equal protection under the rational relationship test.[164]

Zbaraz was not the first case which invalidated a law discriminating between classes of similarly situated beneficiaries of government-provided surgical procedures. In *Hathaway v. Worcester City Hospital,*[165] the First Circuit found that a state could not permissibly distinguish between tubal ligations and comparable surgical procedures under either the strict scrutiny or the rational relationship test.[166] As stated therein, "once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."[167] The *Hathaway* court was faced with a personal right similar to that in *Zbaraz, i.e.,* the

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into "sickle-cell crisis" resulting in death, makes abortions for these women "universally acknowledged" as medically necessary. 469 F. Supp. at 1220 nn.11-12.

[162] *Id.* at 1221.

[163] The district court explained that the Seventh Circuit's mandate included a directive to pass on the constitutionality of the Hyde Amendment, as well as the Illinois statute, even though only the Illinois statute was attacked. Thus the United States government was allowed to intervene pursuant to 28 U.S.C. 2403(a) (1976). The district court concluded: "Therefore, while our discussion of the constitutional questions will address only the Illinois statute the same analysis applies to the Hyde Amendment and the relief granted will encompass both laws." *Id.* at 1215 n.3. The Supreme Court later determined, however, that the district court had exceeded its jurisdictional authority by ruling upon the constitutionality of the Hyde Amendment "in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution." Williams v. Zbaraz, 100 S. Ct. 2694, 2700 (1980).

[164] *Id.* at 1221. *See also* Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir. 1980), where the rational relationship test was used to invalidate a Missouri abortion restriction.

[165] 475 F.2d 701 (1st Cir. 1973).

[166] *Id.* at 705.

[167] *Id.* at 706.

right to choose whether a pregnancy should be prevented.[168] Both courts invalidated the legislation before them under the rational relationship test. The *Harris* Court would have been wiser to follow such reasoning.

III. THE IMPACT OF *Harris v. McRae*

The most disturbing aspect of *Harris* is the impact the decision will have on society. It is estimated that 4.6 million American women of reproductive age are eligible for Medicaid, with 2.6 million of them each year risking an unwanted pregnancy.[169] It is significant that 427,000 of that number wish to end that pregnancy with an abortion and that a majority of this group are young white women.[170] These facts support the proposition that with the Hyde Amendment in force, economic status will be a significant factor preventing many women from obtaining a medically necessary abortion.[171] This unmet demand for abortions raises several other social problems, including: (1) illegitimacy; (2) unstable marriages, especially where teenagers are involved;[172] (3) deepened poverty;[173] (4) a greater dependency on welfare funds after the child is born;[174] and (5) danger to womens' lives from "back alley" abortions.[175] Nonetheless, proponents of the Amendment emphasize the social and moral grounds support-

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[168] *Id.* at 705.

[169] IX WOMEN TODAY 56 (April 30, 1979).

[170] *Id.* These statistics further indicate that 80% of the women in this group are already mothers of young babies. *Id.*

[171] *Id.* at 57. *Cf.* Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. 1979).

[172] See 123 CONG. REC. H4940 (daily ed. July 28, 1977) (remarks of Rep. Edwards) for a thorough discussion of the disastrous effects of this law on teenagers who have unwanted pregnancies: (1) Babies are two to three times as likely to die in the first year; (2) 60% higher maternal death rate for teens than for other mothers; (3) 50% of teenage marriages result in divorce within six years. *Id.* (quoting Beilenson, *Now the Abortion Debate Centers on the Poor*, L. A. Times).

[173] Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun J., dissenting). "There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow." *Id.*

[174] *See* WOMEN TODAY, *supra* note 169, at 57. "The first year medical and welfare costs to society failing to offer poor women the abortions they seek range from $75.2 million to $340 million." *Id.*

[175] See note 178 *infra* for authority relating to this increased danger.

ing the right of unborn children to live.[176]

Society has a substantial economic interest in the result as well. According to HEW estimates, the price of each unwanted child is $2,200.00.[177] Even more important than the financial stake, however, is the danger to womens' lives: "Since the Hyde Amendment, HEW statistics revealed as many as four times the number of abortion-related complications have entered the country's hospitals."[178] As stated by Justice Marshall: "An optimistic estimate indicates that as many as 100 excess deaths may occur each year as a result of the Hyde Amendment. The record contains no estimate of the health damage that may occur to poor women, but it shows that it will be considerable."[179] Therefore, it is clear that by allowing the Hyde Amendment to stand, the *Harris* decision has affected large numbers of the nation's poor women:[180] "The incontrovertible effect of the statute under attack has been to block Medicaid eligible women from medically necessary abortions."[181]

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[176] *See* 122 CONG. REC. H6648 (daily ed. June 24, 1976) (remarks of Rep. Bauman).

[177] NEWSWEEK, July 4, 1977, at 12, 13. See note 158 *supra* for a discussion of the increased costs to the welfare program that result from abortion funding restrictions.

[178] Note, *A Right Without Access? Payment for Elective Abortions After* Maher v. Roe, 7 CAP. U. L. REV. 483, 490 (1978). The statistics confirm the inevitable—that "butchershop abortions" will replace medically safe abortions. Ms., January 1979, at 66. For example, a mother of six from St. Louis, Missouri articulated the fear of many Medicaid eligible women: "I thank the Lord when I laid down on that table that I didn't have to go to one of those quacks who mess you up. I can't afford the children I got." NEWSWEEK, July 4, 1977, at 12-13.

[179] Harris v. McRae, 100 S. Ct. at 2707 (Marshall, J., dissenting). "For example, the risk of serious complications deriving from abortions were estimated to be about 100 times the number of deaths from abortions." *Id.* at 2707 n.2.

[180] Curiously, although the impact of the Hyde Amendment will fall upon poor women and children, during the debate over funding for fiscal year 1979-80, the health of animals was compared to that of fetuses: "A bird, a crow, an eagle, a snail darter, has more legal protection than an unborn being . . . . It is intolerable that this can exist in a society that calls itself caring and humane." 124 CONG. REC. H5362 (daily ed. June 13, 1978) (remarks of Rep. Hyde). "[I]t disturbs me when I hear members of this House come down in the well and talk about birds and crows and eagles . . . . We are talking about American women . . . ." 124 CONG. REC. H5363 (daily ed. June 13, 1978) (remarks of Rep. Stokes).

[181] Right to Choose v. Byrne, 398 A.2d 587, 594 (N.J. Super. Ct. 1979).

CONCLUSION

The upshot of *Harris v. McRae*[182] is that neither the federal government nor the states will be required to fund a great many medically necessary abortions in the days to come. It is deplorable that the heavy impact of this decision will fall upon the shoulders of those already impoverished. As ably expressed by Justice Blackmun:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. . . . I am appalled at the ethical bankruptcy of those who preach a "right to life" that means under present social policies, a bare existence in utter misery for so many poor women and their children. . . .[183]

It is indeed ironic that while the primary purpose of the Medicaid Act was to break the poverty chain, through the Hyde Amendment the Act will now serve to increase dependence on welfare.[184] Finally, there exists the real danger that women denied Medicaid funds will resort to illegal abortionists, causing many injuries and deaths.

Magnifying a thousand times the devastating impact of the *Harris* decision is the fact that the case was wrongly decided. The Court could well have decided the case on statutory grounds, which would have imposed an obligation upon participating states to continue funding all medically necessary abortions. There was ample authority to support such a decision.

When, as a result of its statutory interpretation, the Court found it necessary to address the constitutional issues, the approach taken was highly circumspect. The due process analysis bypassed the implications of *Roe v. Wade*[185] and was based upon the false premise that an indigent woman denied Medicaid funding may nonetheless choose to terminate her pregnancy. The equal protection analysis of the majority

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[182] 100 S. Ct. 2671 (1980).

[183] Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

[184] See notes 158 & 177 *supra* and accompanying text for a discussion of this result.

[185] 410 U.S. 113 (1973).

failed to define the injured class, applied an inappropriate standard of review, and wrongly applied the standard which was selected. The constitutional rights of the nation's poor women were wounded by the legislature which passed the Hyde Amendment. The Supreme Court's decision in *Harris* has salted, not healed, those wounds.

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